Supreme Court, U.S.
FILED
DEC 16 1996
CLERK

(2)

No. 96-829

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JERRY CARR WHITEHEAD,
Intervenor-Petitioner

On Petition for a Writ of Mandamus or Prohibition or, in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada

---

RESPONSE IN SUPPORT OF PETITION

RICHARD G. WILKINS *
BRENT V. MANNING
LEGRAND R. CURTIS
HOLME ROBERTS & OWEN
111 East Broadway
Suite 1100
Salt Lake City, Utah 84111
(801) 521-5800

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

7 pp

PARTIES TO THIS PROCEEDING AND RELIEF SOUGHT

A. Parties: In addition to the Intervenor-Petitioner, other parties to this proceeding include the Honorable Thomas L. Steffen, Chief Justice of the Nevada Supreme Court; the Honorable Charles E. Springer, Associate Justice of the Nevada Supreme Court; the Honorable Robert Rose, Associate Justice of the Nevada Supreme Court; the Honorable C. Clifton Young, Associate Justice of the Nevada Supreme Court; the Honorable David Zenoff, Senior Justice of the Nevada Supreme Court; Frankie Sue Del Papa, Nevada Attorney General; Herbert J. Ahlswede, Special Master; and the Nevada Commission on Judicial Discipline.

B. Relief Sought: Petitioner seeks an order vacating a July 12, 1996 Mandamus Order issued by three members of the Nevada Supreme Court and directing two disqualified justices of that court, Associate Justice Robert Rose and Associate Justice C. Clifton Young, to refrain from taking any further action that modifies the relief granted by the Nevada Supreme Court in a matter in which they are disqualified, including the appointment of any necessary replacement judges. Rule 20(3), Rules of the Supreme Court of the United States.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-829

JERRY CARR WHITEHEAD,
Intervenor-Petitioner

On Petition for a Writ of Mandamus or Prohibition or, in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada

---

RESPONSE IN SUPPORT OF PETITION

Jerry Carr Whitehead has filed a motion to intervene in No. 95-541 and, in addition, has filed a Petition for a Writ of Prohibition or Mandamus to the Nevada Supreme Court. The Honorable Thomas L. Steffen, Chief Justice of the Nevada Supreme Court, and the Honorable Charles E. Springer, Associate Justice of the Nevada Supreme Court, support the motion to intervene.[1] This response is filed in support of the Petition in No. 96-829.

---

[1] A typescript Response in Support of Motion for Leave to Intervene as Petitioner was filed with the Court on December 3, 1996.

OPINIONS BELOW

The Petition seeks to vacate a mandamus order entered by two disqualified justices of the Nevada Supreme Court that is reported at 920 P.2d 489. The opinion is reprinted in the Appendix to No. 96-541 at 1a (hereafter referred to as the "Steffen Pet. App."). Other relevant opinions are set out in the Petition in No. 96-541 at 2 (hereafter referred to as the "Steffen Pet.").

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a) or, in the alternative, 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *." U.S. Const., amend. XIV.

STATEMENT

As the briefing in No. 96-541 already makes clear, this is an extraordinary case. *E.g.*, Steffen Pet. at 2-14; Reply to Oppositions to Petition, No. 96-541, at 1-10 (hereafter referred to as "Steffen Reply"). The essential outlines of this case, moreover, are stark, simple and compelling.

Nevada law, in line with every other jurisdiction in the nation (Steffen Pet. at 4-6), requires that "[a]ll [judicial disciplinary proceedings] must be kept confidential until there has been a determination of probable cause and a filing of formal statement of charges." Rule 5(1), Administrative and Procedural Rules for the Nevada Commission on Judicial Discipline. Despite this clear command, significant confidential information regarding disciplinary charges against Judge Whitehead was leaked to the press. As a result, and in response to Judge White-

head's motion (Steffen Pet. App. C 10a, 25a-28a), the Nevada Supreme Court appointed a Special Master to determine the source of the leaks and the extent to which those leaks had harmed Judge Whitehead's due process rights. *Id.* Shortly after the Special Master uncovered evidence that members of the Supreme Court and the Nevada Attorney General were involved in the illegal dissemination of confidential information (*e.g.*, Steffen Pet. at 10; Steffen Reply at 8-10; Steffen Pet. App. H 187a-276a (deposition of Pat Lundvall)), two disqualified members of the Nevada Supreme Court and the Nevada Attorney General combined in a raw, unrestrained exercise of power to undermine the very concept of due process in Nevada.

REASONS FOR GRANTING THE PETITION

1. Intervenor-Petitioner Jerry Carr Whitehead plainly has standing to seek review of the challenged order of the Nevada Supreme Court. As set out in the briefing in No. 96-541, the order of the Nevada Supreme Court at issue here reverses rulings and vacates relief previously granted to Judge Whitehead. Steffen Pet. 16-19; Steffen Reply 1-3. As such, Judge Whitehead unquestionably has "personally * * * suffered some actual * * * injury." *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982).

2. The formal exclusion of Judge Whitehead from this matter, moreover, was mere artifice. The Nevada Attorney General sought to reverse final rulings obtained by Judge Whitehead by the simple expedient of suing the Justices who entered those rulings—without naming Judge Whitehead as a party. This cynical procedural ploy not only disregards established precedent,[2] it improperly

[2] *See* Steffen Pet. App. G 152a-155a (Nevada Supreme Court cites copious authority for proposition that litigants cannot obtain reversal of a ruling by merely suing the judge who issued it).

denied Judge Whitehead the ability to protect his interests. As the Nevada Supreme Court has already noted, "Jerry Carr Whitehead * * * stands to lose the most from the actions of [the Nevada Attorney General] and the [disqualified] justices as he expended substantial legal resources in order to achieve at least a form of justice in the *Whitehead* case." Steffen Pet. App. G 152a. Judge Whitehead is a proper party in this matter.

3. The relief that Judge Whitehead seeks, finally, should be granted. After evidence of wrongdoing on the part of the Attorney General and members of the Nevada Supreme Court was uncovered by the Special Master,[3] the Attorney General filed a petition for a writ of prohibition for the sole purpose of thwarting any further investigation into her misdeeds. That petition, in turn, was granted by two disqualified members of the Nevada Supreme Court—at least one of whom was strongly implicated as the source of the leaks within the Nevada Supreme Court. Steffen Reply 9-10. In these circumstances, the conclusion is inescapable that Justices of the Nevada Supreme Court have acted as "'judge[s] in [their] own case.'" *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 822 (1986) (*quoting In re Murchison*, 349 U.S. 133, 136 (1955)). The Due Process Clause, plain and simple, cannot tolerate this result. *Aetna*, 475 U.S. at 827-828 ("no case" has been permitted "to stand when a disqualified judge casts the deciding vote").

CONCLUSION

Suspicions regarding the integrity of the Nevada Supreme Court are not uncommon. *See, e.g., Hogan v. McDaniel*, No. 95-9341, *cert. denied*, 1996 WL 375463 (October 15, 1996) (Justice O'Connor and Justice Ginsburg would grant certiorari) (petition asserts that Justice

---

[3] *E.g.*, Steffen Pet. App. C 83a (Justice Shearing concedes, in dissenting from the order appointing the Special Master, that "recent events lead to the strong inference that the breach of confidentiality occurred within this court").

Rose improperly failed to recuse himself in a criminal matter when Justice Rose knew he was a target of a criminal investigation by the prosecution); *Snyder v. Viani*, No. 96-168, *cert. denied*, 65 USLW 3110 (Nov. 4, 1996) (petition asserts that Justice Rose improperly failed to recuse himself in a 3-to-2 decision in which he had a pecuniary interest). Absent relief here, the citizens of Nevada may well conclude that their judges—alone in the country—are " 'permitted to [decide] cases where [they have] an interest in the outcome.' " *Lavoie*, 475 U.S. at 822 (quoting *In re Murchison*, 349 U.S. at 136).

This Court must act. The needed action, however, is neither extensive nor difficult. Granting the Petitions in either this case or No. 96-541 will merely require the Court to enter a simple order vacating a mandamus order improperly entered by disqualified judges and directing those judges to take no further actions interfering in the *Whitehead* case (including the appointment of any necessary replacement judges). No further relief, intervention or oversight by this Court is (or will be) necessary. Because this case involves a " 'principle of justice so rooted in the traditions and conscience of our peoples as to be ranked as fundamental' " (*Lavoie*, 475 U.S. at 821, *quoting Patterson v. New York*, 432 U.S. 197, 201-202 (1977)), this Court can do no less.

Respectfully submitted,

RICHARD G. WILKINS *
BRENT V. MANNING
LEGRAND R. CURTIS
HOLME ROBERTS & OWEN
111 East Broadway
Suite 1100
Salt Lake City, Utah 84111
(801) 521-5800

* Counsel of Record

December 16, 1996